Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reorganization and Revision	)	
of Parts 1, 2, 21 and 94	)	**WT Docket No. 94-148**
of the Rules to Establish a	)	
New Part 101 Governing	)	
Terrestrial Microwave Fixed	)	
Radio Services	)	

To: The Commission

PETITION FOR RECONSIDERATION/CLARIFICATION

Pursuant to Section 1.429 of the Federal Communications Commission's (FCC) Rules, UTC, The Telecommunications Association (UTC),[1] respectfully requests reconsideration and clarification of three aspects of the Commission's *Report and Order* (*R&O*), WT Docket No. 94-148, released February 29, 1996, in the above-captioned proceeding.[2]

As the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines, UTC filed comments and reply comments with regard to the consolidation of the rules for the Private Operational Fixed

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[1] UTC was formerly known as the Utilities Telecommunications Council.

[2] The *R&O* was published in the Federal Register on Tuesday, May 28, 199[illegible]

Service (POFS) and the Common Carrier Point-to-Point Microwave Service. As a general matter UTC supports the new rules adopted by the FCC as they will streamline and facilitate the licensing and operation of these important communications systems. However, UTC believes that the rules can be further improved by:

- Clarifing that there is no minimum percentage of capacity that common carriers must utilize for common carrier communications;
- Amending the rules to allow private system licensees to carry common carrier traffic;
- Amending the rules to allow private system licensees to act as carrier's carriers without themselves being considered common carriers; and
- Clarifying the application of new section 101.65 (Forfeiture and Termination of License) in relation to the on-going microwave relocation process in the 2 GHz band.

I. POFS Licensees Should Be Permitted To Carry Common Carry Traffic

In its initial comments UTC noted that FCC Rule Sections 94.9(b) and 94.17 effectively prohibited the use of POFS facilities to transmit common carrier communications, and that Rule Section 21.119 prohibited the use of common carrier facilities for the transmission of non-common carrier traffic, including the licensee's own internal communications. UTC requested the elimination of these restrictions in order to conform with the overall consolidation of the common carrier and private microwave rules.

In adopting new Part 101 the FCC elected to grant half of UTC's request by eliminating the restriction on the use of common carrier transmitters for non-common carrier purposes. Under the new rules, licensees who operate common carrier stations will

be able to provide private services at the same location without having to construct duplicative facilities. Consistent with UTC's recommendation, the Commission noted that this action will promote economic efficiencies by reducing construction and operating costs associated with operating separate facilities. However, the FCC declined to modify its rules to allow private microwave licensees to offer common carrier services or to lease reserve capacity to common carriers for their common carrier traffic. UTC requests reconsideration of this decision.

The FCC did not express opposition to the concept of allowing the transmission of common carrier communications over private microwave facilities, or cite any countervailing arguments. Instead, the FCC stated that it had considered the issue as part of PR Docket No. 83-426, but that proceeding had been terminated because the record had become stale. The FCC indicated that it remains "open" to further pursuit of this issue.[3] In addition, the FCC pointed to the increased flexibility that it has given to common carriers, and suggested that private licensees who desire to carry common carrier traffic as well as internal communications simply become common carrier licensees.

While UTC applauds the Commission's decision to allow common carriers the added flexibility to transmit internal traffic, it is a solution that only addresses half of the equation. Consolidation of Parts 94 and 21; the reclassification of former private mobile licensees as common carriers; and the passage of the Telecommunications Act of 1996, all dictate that private licensees be given the flexibility to carry common carrier

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[3] *R&O*, para. 42.

communications as carrier's carriers. Such action is clearly within the scope of this proceeding and is a logical outgrowth of the proposed rules and the comments received by the Commission.

When the private and common carrier microwave services were completely independent, it may have been appropriate for the FCC to limit encroachment on the frequencies available to one service by entities eligible in the other. Now, however, with most microwave bands available on nearly equal terms to entities in either service, there is less concern that a licensee should restrict its operations to either purely "private" or a purely "common carrier" operation. The nature of the licensee's operation, and the nature of the regulatory regime affecting that licensee, are no longer dependent on the particular frequency band in which the licensee operates. Rather, the type of regulation is dependent simply on the type of service or use made of the facilities. In fact, the Telecommunications Act specifically states that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services...[4] It would therefore appear to be inconsistent with the Act to require a private microwave licensee to change its licensing status in order to simply offer a portion of its capacity on a common carrier basis.

While the new rules provide the option of private licensees being relicensed as common carriers, as a practical matter many private microwave licensees that are only

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[4] Now Section 3(49) of the Communications Act of 1934, as amended by Section (3) of the Telecommunications Act of 1996.

seeking to provide a modest portion of their capacity on a common carrier basis may decide not to exercise this option because it will subject them to the full panoply of common carrier obligations with relatively little gain in return.

In addition it is not clear from the *R&O* whether the Commission would continue to require common carriers to use at least 50% of their available capacity for common carrier traffic as is had been required under the rules first established in Docket No. 15586.[5] If the 50% rule continues to be in effect then the common carrier option may not be a viable alternative for licensees such as utilities and pipelines who intend to primarily utilize their system's capacity for internal purposes. Therefore, at a minimum, the FCC should clarify that common carrier microwave licensees are no longer required to use a certain percentage of the system's capacity on a common carrier basis.

Moreover, as UTC pointed out in its Comments, the FCC's recent decisions in connection with Commercial Mobile Radio Services (CMRS) will require many private microwave licensees to relicense their microwave facilities as "common carrier" systems even though they have no interest in offering common carrier microwave service. For example, licensees of Specialized Mobile Radio (SMR) systems often use private microwave to control their base station facilities or to interconnect sites. However, any SMR that is reclassified as a CMRS operator will no longer be eligible to use a "private" microwave facility because CMRS is defined as "common carrier" service. Such a result

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[5] *First Report and Order and Further Notice of Proposed Rule Making*, Docket No. 15586, 6 RR2d 1549 (1965).

seems unnecessary since the SMR is not offering the use of the microwave facilities to customers. A similar dilemma faces an SMR licensee that merely leases or shares capacity with another private microwave licensee.

Finally, as a fundamental matter the FCC must recognize, as stated above, that the Telecommunications Act only allows the imposition of common carrier requirements on "telecommunications carriers" which the Act defines as providers of "telecommunications services." Accordingly, the FCC must focus on the definition of telecommunications service in order to determine who can be subject to common carrier regulations. The Act defines telecommunications service as follows:

> *The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.*

A parsing of the definition of "telecommunications service" indicates that in order to be considered a telecommunications service provider an entity must offer service directly to the public, or to such classes of users as to be effectively available directly to the public. By adopting this element of the definition, Congress expressed its intent that the determination of whether an entity is acting as a telecommunications service provider should focus on whether the service provider is itself directly offering service to the end-user public.

Inclusion of the alternative phrase, "or services offered to such classes of users as to be effectively available directly to the public," does not alter this analysis, as this clause

also looks to whether the service provider is offering service directly to the end user public. The "effectively available" language was included to ensure that providers who offer service to certain broad classes of end users, rather than the public at-large, are included within the scope of the definition. In this way, carriers who directly serve a sufficiently large segment of the public so as to make their service effectively available to a substantial portion of the public are considered telecommunications service providers. This reading is consistent with the Commission's interpretation of similar statutory language contained in the definition of CMRS. A CMRS provider is defined, in part, as one who makes "service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public."[6] The FCC interpreted this language as including carriers who do not limit their offerings to a significantly restricted class of eligible end users.[7] However, unlike the CMRS definition, the new Act's definition of telecommunications service contains an explicit requirement that the provider offers service directly to the public.

The lease of private microwave capacity to third-party common carriers for the transmission of the carrier's common carrier communications would not be a "direct" offering of service to the public. In this way a private microwave licensee could privately contract to act as a carrier's carrier without itself being considered a telecommunications service provider. Of course, a common carrier leasing such bulk transmission capacity

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[6] Section 332 (d)(1) of the Communications Act of 1934 as amended by the Omnibus Budget Reconciliation Act of 1993.

[7] *Second Report and Order*, GN Docket 93-252, 9 FCC Rcd 1411 (1994).

from a private microwave licensee and using it to provide for-profit service directly to the public would be offering "telecommunications service" and would therefore be subject to common carrier regulation.

The exclusion of "carrier's carrier" arrangements from the definition of telecommunications services comports with the overall intent of the Act to encourage additional facilities-based competition. By allowing entities such as utilities and pipelines to offer reserve transmission capacity on a non-common carrier basis, new services and competitors can be introduced in the marketplace. It would therefore be incongruous to specifically allow for the operation of carrier's carriers on a non-common carrier basis under the Telecommunications Act, but to have the FCC's rules prohibit such activities with regard to microwave systems. In addition, such a requirement would be inconsistent with the FCC's goals of creating regulatory parity.

For all of the above reasons, UTC urges the FCC to eliminate new Section 101.603(b)(1) which prohibits stations licensed as private systems from offering communications services, and to clarify that a private microwave licensee may act as a "carrier's carrier."

II. The FCC Should Clarify That New Section 101.65 Does Not Apply To 2 GHz Microwave Licensees That Are In the Process of Relocating From The Band

Under the Commission's transition rules[8] for relocating incumbent microwave licensees from the 2 GHz band in order to accommodate new personal communications services and other emerging technologies, it is anticipated that incumbents may de-commission or remove their facilities prior to the complete installation and acceptance of replacement facilities. For example, in order to expedite PCS entrance, an incumbent may enter into an agreement to turn off its existing system and use leased circuits or unlicensed equipment for the interim period during which its replacement facilities are being constructed and tested.

The adoption of new Section 101.65 related to the forfeiture and termination of station authorizations raises some ambiguity as to its application in relation to 2 GHz transition rules. Specifically, new Section 101.65(a)(3) states that "[a] license will be automatically forfeited in whole or in part without further notice to the licensee upon the voluntary removal or alteration of the facilities, so as to render the station not operational for a period of thirty (30) days or more." UTC assumes that this subsection is meant to apply to situations where a licensee voluntarilyy disables its facilities with no intention of reactivating them, and is not intended to apply to interim microwave relocation arrangements or testing periods. However, given the need for certainty with regard to the microwave relocation process, UTC urges the FCC to clarify that Section 101.65 does not

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[8] 47 C.F.R Section 94.59 (Section 101.69, effective August 1, 1996).

apply in instances where the 2 GHz microwave incumbent has removed or altered its facilities pursuant to an interim agreement or other on-going relocation efforts pursuant to Section 94.59 (Section 101.69). Specifically, UTC recommends the adoption of the following new subsection to Section 101.65 in order to effectuate this clarification:

> (e) The time period set forth in paragraph (a)(3) of this section shall not commence to run by reason of the alteration or removal by a licensee of its microwave facilities , or the discontinuation of operations by a licensee, pursuant to such licensee's on-going microwave relocation efforts being implemented in accordance with section 101.69.

III. Conclusion

The FCC should amend its rules to allow private microwave licensees to offer common carrier services and to act as carrier's carriers. In addition, the FCC should clarify that Section 101.65 does not apply in instances where the 2 GHz microwave incumbent has removed or altered its facilities pursuant to an interim agreement or other on-going relocation efforts pursuant to Section 94.59 (Section 101.69).

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in this petition.

Respectfully submitted,

UTC

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